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THE SALE OF INTOXICATING LIQUORS BY SOCIAL CLUBS.—The association of select bodies of persons organizing and fostering fraternal orders and social clubs has become a distinctive element in the social fabric of the present day. Their avowed purpose is the advancement and uplift of their members socially, morally, and otherwise. In the larger cities especially is the complete realization of the objects and purposes of these associations more nearly attained. They frequently own their buildings and grounds, and generally provide reading rooms and other means of profitable recreation, entertainment and amusement for their members. By bringing at hours of leisure their members together on easy terms of social intimacy, they exert unquestionably a rejuvenating influence upon society. That numerous such clubs furnish to members intoxicating liquors for their own use and that of their invited guests at the cost to the club of procuring and serving, though only as an incident to its main purpose and for the convenience of the members, is undoubtedly an attractive feature in the eyes of many.

The usual plan adopted by such a club by which its members obtain liquors is about as follows: A contribution by membership fee or subscription is made to a common fund, placed in the hands of an officer of the club. This officer or agent of the club invests the money so contributed in a stock of intoxicating beverages. Each member desiring the privilege of the buffet procures from the agent in charge a book of tickets or coupons representing the value of the quantity of liquor desired, and for which the member

pays in cash. When liquor is wanted by such member for his own use or that of his invited guests, he presents his coupon book to the steward of the club who tears therefrom coupons or tickets to the amount of the liquor demanded by the member. The money paid by the member for these tickets or coupons is reinvested by the officer of the club in other intoxicating liquors.

Whether or not the distribution of intoxicants to its members by a social club adopting a plan similar to that described above is a violation of laws prohibiting the sale of liquors or requiring the payment of a license tax before liquors may be sold or dealt in, is a question which has given the courts much difficulty, and has resulted in a decided conflict of authority in the several jurisdictions. The question is to be determined primarily according as to whether or not such a distribution is considered a sale; and this is true whether or not the prosecution is for a selling without license, or a sale under statutes prohibiting the sale of intoxicants in prohibition territory. While this principle will be controlling, many decisions will be found based upon the particular wording of a statute, which is construed to apply or not, as the case may be, to social clubs dispensing liquors to members. Other cases will be found which base their decision largely upon the intention or object of the legislature as implied from the conditions existing at the time the statute was passed and sought to be remedied, and as indicating the policy of the laws regulating or prohibiting the sale of liquor.[1] Indeed, many cases while discussing at length whether or not such a transaction amounts to a sale, prefer to base their decision rather upon the policy of the statute in question than upon any technical definition of a sale. This fact accounts in no small measure for the conflict of authority, otherwise irreconcilable, and should be consistently borne in mind. For example, while it is everywhere admitted that offenses against the liquor laws, such as illegal sales of intoxicants, keeping liquor in possession with intent to dispose of it unlawfully, and other such offenses, are statutory crimes, not being indictable or punishable at common law, and should be strictly construed;[2] yet such a statute passed solely for the purpose of raising revenue might reasonably receive a more liberal interpretation than a similar statute passed for the purpose of punishing what, in some jurisdictions, is considered a public immorality.[3]

In deciding whether or not a sale has been made, a distinction is quite generally drawn between clubs incorporated, and voluntary or unincorporated associations. Whether or not the final result shall be the same, this distinction would seem pertinent since the one involves principles somewhat different from the other. A corporation is a distinct legal entity, having an existence and person-

[1] United States *v.* Wittig, 2 Lowell (U. S.) 466, Fed. Cases No. 16,748; People *v.* Soule, 74 Mich. 250, 41 N. W. 908, 2 L. R. A. 494.

[2] State *v.* Johnson, 61 Iowa 504, 16 N. W. 534; State *v.* Colonial Club, 154 N. C. 177, 69 S. E. 771.

[3] United States *v.* Wittig, *supra.*

ality separate and apart from that of the members who compose it. The title to all its property is in the corporation, and not in the members. An unincorporated association, on the other hand, possesses no such peculiarities. Its existence is assimilated with and incorporated into that of its members; it exists through, and not apart from them. The title to its property is in the members.

Where an incorporated club, acting through its officer or agent, invests the money of its members in intoxicating liquors, purchasing and holding the same in its own name, and making distribution in the manner above indicated, the undoubted weight of authority is to the effect that such a distribution amounts to a sale, rendering the club or its agent liable to prosecution under statutes regulating or prohibiting the sale of liquors.[4] It would seem to be immaterial how much funds were contributed by the members. It is reasoned that title to the liquor vests in the corporation, and passes to the member upon the payment of a stipulated price, thus involving all the essential elements of a sale. A contrary view is taken by many courts of high standing on the ground that title to the liquors is never vested in the corporation, but that it, or its officer, acts merely as the agent of the members; or else, that although the corporation have title, still it holds the same for the benefit of the members who compose it, and that by allowing a member to withdraw a part of the liquors it makes no sale, since the money paid by him upon procuring the liquor is, by his direction, reinvested in other liquors to take the place of that portion of the common stock which he has consumed.[5]

As already noted, the same question with reference to an unincorporated club or association must be determined upon somewhat different considerations. Here the officer or agent of the club appointed to purchase and dispense the liquors is truly the agent of each member of the association, and the liquor when purchased belongs to the members. The member consumes a part of the liquor purchased with a fund to which he has ratably contributed. He pays over to his agent an amount of money equal to the cost of that which he has consumed, with orders to use this money to replace the same. Whether or not by such a transaction he has

[4] Martin *v.* State, 59 Ala. 34; People *v.* Soule, *supra;* State *v.* Boston Club, 45 La. Ann. 585, 12 So. 895, 20 L. R. A. 185; Nashville Club *v.* Shelton, 104 Tenn. 101, 56 S. W. 838; South Shore Club *v.* People, 228 Ill. 75, 81 N. E. 805, 119 Am. St. Rep. 417, 12 L. R. A. (N. S.) 519; City of Spokane *v.* Baughman, 54 Wash. 315, 103 Pac. 14; Conococheague Club *v.* State, 116 Md. 317, 81 Atl. 602; State *v.* Minnesota Club, 106 Minn. 515, 119 N. W. 494, 20 L. R. A. (N. S.), 1101; State *v.* Robinson, 163 Mo. App. 221, 146 S. W. 456.

[5] Piedmont Club *v.* Commonwealth, 87 Va. 540, 12 S. E. 963; State *v.* McMasters, 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826; People *v.* Adelphi Club, 149 N. Y. 5, 43 N. E. 410, 52 Am. St. Rep. 700, 31 L. R. A. 510; Klein *v.* Livingston Club, 177 Pa. St. 224, 35 Atl. 606, 55 Am. St. Rep. 717, 34 L. R. A. 94; Moriarty *v.* State, 122 Tenn. 440, 124 S. W. 1016, distinguishing, though in fact practically overruling, Nashville Club *v.* Shelton, *supra.*

become a party to a sale and should be regarded as a purchaser, presents a question which has given rise to much contrariety of opinion. If there is a previous agreement among the members that upon the arrival of the liquors each is to get a certain share of the same, proportionate to the amount contributed, and he can get that and no more, it would seem that no sale is made.[6] The member has received only that which was his own—a definite share which has been previously agreed upon, the title to which has at all times been in himself. It can make no difference that one agent has been selected to represent numerous persons. Nor can there be any objection made that a consideration has been paid him for procuring and dispensing the same to the true owners, he being paid for a service rendered, not for liquor, because he owned none. Nor would the transaction be any the more a sale if, as each member consumes his share, he gives the same agent its equivalent in value with instructions to purchase therewith more liquor. The usual case, however, differs from the facts supposed in that there is no previous agreement as to the share each member shall have. A fund is contributed by the members with instructions to purchase a stock of liquors. Upon receipt of the same each member may consume much or little, as he chooses, provided always that he pays a sum of money equal to the value of the liquor consumed, which is to be spent for more liquor. It is argued by eminent authorities that even this can amount to no sale, but that the arrangement is only a means for making an equitable distribution whereby each member is prevented from depriving another member of his just share in the common stock.[7] The English case of *Graff* v. *Evans* [8] is a leading case taking this view. The Massachusetts case of *Commonwealth* v. *Smith* [9] is probably the first case of importance upon the subject in this country, and is often cited to support this view. In that case, however, it was held that under facts similar to the case supposed above, that is, where there was a previous agreement as to the share each should take, there would be no sale.[10]

Those courts which hold that in the case of an incorporated club no sale is made by dispensing liquors in the manner indicated, like-

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[6] Commonwealth *v.* Smith, 102 Mass. 144.

[7] Commonwealth *v.* Pomphret, 137 Mass. 564, 50 Am. Rep. 340.

[8] 8 Q. B. 373. The decision is based largely upon the policy of the statute. The court's reasoning, as shown by the following language, that the transaction is not a sale, may well be questioned: "Foster had a property, or at least an interest in the goods which were transferred to him. Foster, on payment, got from the barman who served him the interest of the other 1,099 members, who thereby transferred their interest to him. There was no transfer of the general or absolute property in the goods to Foster, but a transfer of a special interest."

[9] *Supra.*

[10] Quoting from the opinion of the court: "If the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some other person than the defendant, or if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, there would be neither a selling nor a keeping for sale."

wise reach the same conclusion with reference to unincorporated clubs. A few authorities while declaring such a plan when adopted by an incorporated club amounts to a sale, reach a different conclusion with reference to unincorporated associations. Probably a majority of the better reasoned cases, while readily admitting that the usual plan adopted for distribution is equitable so far as the members are concerned, nevertheless hold that the transaction amounts to a sale, the fact that the association is not a corporation having no effect upon the final result.[11] These cases hold that since there is no previous agreement as to the share each member shall receive, they own the whole in common, each owning an undivided and unascertainable portion of the whole, and having title to no specifically designated share; that each owns an interest in every portion drawn from the common stock, however small; that it is only upon delivery to a member of a quantity called for by him that he obtains the absolute title to any liquor in stock; that upon such delivery, since the member is required to pay an amount of money equal to the value of the liquor, there is a sale from all the other members to this member,[12] it being immaterial that the money paid by the latter is used to replenish the stock. The Court of Appeals of Georgia, in the recent case of *Deal* v. *State,* 80 S. E. 537, after an extended discussion and review of the authorities, commits itself to this view.[13]

The Supreme Court of North Carolina, in a comparatively recent case,[14] has sanctioned a plan by which a *bona fide* social club may dispense liquors to its members without incurring the penalties of the law. The facts as found by the jury, rendering a special verdict, were as follows: The club keeps a book with order blanks for lager beer. Each order blank has a stub corresponding with the number on the order, this stub to be kept by the club as a memorandum of the order made. These blanks are paid for by the club, but no officer of the club solicits a member to make an order. When an order is made by a member of the club, the money is then given to the manager, and the manager turns the money over to the treasurer. The treasurer has a banking account in which he banks the amount received by him, and sends the order on to the

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[11] United States *v.* Wittig, *supra;* State *v.* Neis, 108 N. C. 787, 13 S. E. 225, 12 L. R. A. 412; Manning *v.* Cannon City, 45 Colo. 571, 101 Pac. 978, 23 L. R. A. (N. S.) 192; Deal *v.* State (Ga.), 80 S. E. 537. It will be noted that many of the cases cited in note 4, *supra,* use language broad enough to cover the present case, or by way of *dicta* indorse this view.

[12] In these jurisdictions, it usually being impracticable to prosecute all the members, it is the agent of the club who is prosecuted under statutes declaring it illegal to aid in the making of a sale or to aid and abet the commission of a misdemeanor. See Deal *v.* State, *supra.*

[13] While the liquor was procured and paid for by a non-member, the decision is not made to turn upon this point. As to the materiality of this fact, see State *v.* Warcholik, 80 Conn. 351, 68 Atl. 379.

[14] State *v.* Colonial Club, *supra.*

liquor house (outside the State), with the check of the club for the amount received from the member. The beer is sent to the member in his own name, in care of the club. The club makes no charges, nor does it get any profit out of the transaction. When the liquor is received by the club, the manager gives the member a book with the same number on it as was on the order blank and on the stub. If the order was for twelve dozen bottles of beer, the book would contain twelve dozen separate coupons. All the beer thus received is put in refrigerators of the club, and is mixed with beer of other members. When a member wishes a bottle of beer for himself or his friend, he hands the book to the steward of the club, who tears out a coupon for each bottle of beer ordered, getting the beer out of the club's refrigerators.

Distinguishing this case from that of *State* v. *Lockyear*,[15] where liquors were purchased by and in the name of an incorporated club, and from *State* v. *Neis*,[16] where an officer or agent of an unincorporated association purchased liquor with a common fund and distributed it indiscriminately to any member at ten cents a drink, it was held (two judges dissenting), that no sale was made, but that the club acted only as a gratuitous bailee in the transaction.[17] The defendant in this case was an incorporated club, but this fact is immaterial since the plan would operate equally as well if adopted by an unincorporated association.

There is at least one point upon which all the courts have reached agreement. Where a club or association, of any nature whatsoever, is formed merely for the purpose of selling liquor, though only to its members, in defiance of laws prohibiting or regulating the sale thereof, and as a mere device to escape the payment of a license tax or otherwise to evade the law, such a device will receive no recognition, and will in all cases be held subject to the

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[15] 95 N. C. 633, 59 Am. Rep. 287.

[16] *Supra.*

[17] The court thus states its reasons and conclusion: "It is to be noted that the special verdict finds other facts pertinent to this contention, to wit: that the member who ordered the ten dozen pint bottles to a particular brand of beer received that beer of the brand when and as he desired; that beer coupons were issued to him showing the quantity and brand ordered; that when the quantity ordered by him and delivered to defendant was exhausted, he could get no more; and that the beer coupons were used as a check to prevent the member from overdrinking his beer. There was no arrangement or understanding that the member was to be paid for any shortage, or that the defendant had any power of substitution or any right of disposal except as called for by the member who delivered it to the club. There was no storage charge or charge of any kind made or received by defendant for his services nor any gain or profit of any kind or nature to it in the transaction, nor, if a sale, any consideration, however small, to support the transaction as a sale. It was wholly a gratuitous service. No consideration was paid the defendant, nor promised it; the member drank the quantity and quality of beer as ordered by him, and no more. The defendant was only a gratuitous bailee."

punishment provided by law.[18] Many cases decided mainly on this ground yet discuss in great detail whether or not technically there has been a sale. Such opinions have added considerably to the confusion of authorities. Manifestly, they should be accorded little weight when the question is solely whether or not there has been a sale, as they may be correctly decided independently of this consideration.

These latter decisions are, no doubt, the birthplace of the rather illogical test laid down by some of the courts as to what in such cases will constitute a sale; namely, that if the club is a *bona fide* social club, organized and maintained for proper and worthy purposes, and dispensing liquor to its members only as an incident to its main object and purpose and merely for the convenience of its members, then such club cannot be held to have been guilty of selling liquors; if not a *bona fide* club, then it has sold liquor.[19] Whether a club is a *bona fide* organization or not is unquestionably a material fact in determining that it is, or is not, merely a device to evade the laws;[20] but that having been decided in the affirmative, the question whether or not a sale has been made should be decided independently. There would seem to be no logical reason why a sale should be any the less a sale merely because the seller, as his principal occupation, happens not to be engaged in the business of selling that particular commodity.[21]

SITUS OF CORPORATE STOCK FOR PURPOSES OF FOUNDING ADMINISTRATION.—On the death of a stockholder in a foreign corporation the question as to the situs of the shares of stock for the purpose of founding administration has several times come before the American courts. Does the property evidenced by the stock certificate have its situs in State A, the State in which the corporation was organized and in which it does business, or does it, for the purpose of founding administration, have a situs in State B, the State of the domicil of the decedent? The question is most likely to become of real importance in case the decedent left unsecured creditors in State A whose debts are void by the law

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[18] State *v.* Mercer, 32 Iowa 405; Marmont *v.* State, 48 Ind. 21; Rickart *v.* People, 79 Ill. 85; Commonwealth *v.* Ewig, 145 Mass. 119, 13 N. E. 365.

[19] See Commonwealth *v.* Pomphret, *supra;* and Moriarty *v.* State, *supra.*

[20] Or whether or not it is in the "business" of selling liquor within the meaning of statutes imposing a license tax upon the "business of liquor dealers." Barden *v.* Montana Club, 10 Mont. 330, 25 Pac. 1042, 24 Am. St. Rep. 27, 11 L. R. A. 593; Deal *v.* State, *supra.*

[21] While the fact that a profit is or is not made by the transaction may be of some evidential value, the doctrine, sometimes expressed, that it should be determining, is quite generally repudiated. South Shore Country Club *v.* People, *supra;* Graff *v.* Evans, 8 Q. B. 373.